Supreme Court, U.S.
FILED
JUL 10 1970
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IN THE

Supreme Court of the United States

October Term, 1969

No. 1[redacted] 89

ALTON J. LEMON, PRISCILLA REARDON, BETTY J. WORREL, and PENNSYLVANIA STATE EDUCATION ASSOCIATION, PENNSYLVANIA CONFERENCE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PENNSYLVANIA COUNCIL OF CHURCHES, PENNSYLVANIA JEWISH COMMUNITY RELATIONS CONFERENCE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, AMERICAN CIVIL LIBERTIES UNION OF PENNSYLVANIA, INC.,

Plaintiffs-Appellants,

v.

DAVID H. KURTZMAN, as Superintendent of Public Instruction of the Commonwealth of Pennsylvania, GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, ST. ANTHONY'S ROMAN CATHOLIC CHURCH SCHOOL, ARCHBISHOP WOODS GIRLS HIGH SCHOOL, UKRANIAN CATHOLIC SCHOOL, GERMANTOWN LUTHERAN ACADEMY, AKIBA HEBREW ACADEMY, PHILADELPHIA MONTGOMERY CHRISTIAN ACADEMY, and BETH JACOBS SCHOOLS OF PHILADELPHIA,

Defendants-Appellees,

and

PENNSYLVANIA ASSOCIATION OF INDEPENDENT SCHOOLS,

Intervenor-Defendant-Appellee.

On Appeal from a District Court of Three Judges for the Eastern District of Pennsylvania

BRIEF OF AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AMERICAN VOCATIONAL ASSOCIATION, ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, HORACE MANN LEAGUE OF THE UNITED STATES, NATIONAL ASSOCIATION OF ELEMENTARY SCHOOL PRINCIPALS, NATIONAL EDUCATION ASSOCIATION, NATIONAL SCHOOL BOARDS ASSOCIATION, AND RURAL EDUCATION ASSOCIATION, *AMICI CURIAE*

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Interest of the *Amici*

The organizations submitting this brief represent hundreds of thousands of Americans directly and substantially involved in public education as teachers, administrators and members of school boards.

"Designed," as Mr. Justice Frankfurter noted,[1] "to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people," our public school system rests on three fundamental principles of universality—universality of control, of access and therefore of support. The public school system is controlled by all of the public, even by those whose children do not attend it.[2] It is open to all; it may not exclude children whose parents are too poor to pay taxes any more than those whose parents are wealthy enough to pay tuition at private schools. It may not exclude children because of their race,[3] religion,[4] political beliefs,[5] or because their standards of behavior or intellectual achievement may be below those the school authorities would like to maintain. And because it may not close its doors to any of the public, it is constitutionally entitled to financial support out of taxes imposed

1. *McCollum* v. *Board of Education*, 333 U. S. 203, 216 (1948) (concurring opinion).

2. *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969).

3. *Brown* v. *Board of Education*, 347 U. S. 483 (1954).

4. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

5. *Tinker* v. *Des Moines Independent Community School District*, 393 U. S. 503 (1969); *Keyishian* v. *Board of Regents*, 385 U. S. 589 (1967).

upon all of the public, even of those who have no children or elect to send their children to nonpublic schools.[6]

We are not unaware of the failings of the public school system. We recognize that it is being subjected to widespread criticism, particularly in its operations in crowded, impoverished urban areas. To a substantial extent, this criticism attributes to the public schools responsibility for so much of the ills of urban poverty, thus perhaps revealing how much is expected of them. Nevertheless, recognizing the deficiencies of public education, we believe that the solution is to be sought in improvement, not in dismemberment.

America has great faith in its public school system. We believe that this faith is not misplaced. The American public school system is one of the most precious contributions we have made to modern civilization. It would be a tragedy not only for America but for all the world if it were destroyed.

The statute challenged in this case is but one of the many increasingly successful efforts throughout the nation to siphon off public funds for nonpublic schools. Unless halted, the inevitable result will be a proliferation of private schools with an escalation of the exodus of middle class children from public schools. The end result cannot be anything but a public school system inhabited almost exclusively by the disadvantaged poor. We would be returning to the days of the degrading charity schools although they would now be euphemistically labeled public schools.

6. *Stuart* v. *School District No. 1*, 30 Mich. 69 (1874).

Because we believe that the current extensive effort to divide tax-raised funds between public and nonpublic schools represents the gravest crisis public education has faced in its history, we are submitting this brief *amici curiae* with the consent of the parties.

The Nature of the Action

This is a suit challenging the constitutionality, on its face and as applied, of a law enacted by the State of Pennsylvania in June of 1968 providing for the purchase by the State of the services of teachers in nonpublic schools in teaching certain secular subjects to the children attending those schools. Under the statute, no professional requirements are imposed in respect to teachers presently employed in the nonpublic schools or those engaged within five years after the effective date of the statute. Thereafter, new teachers employed will be required to hold certification by the Department of Public Instruction equal to the standards for teachers in public schools. However, in order to receive payment for the educational services rendered, only textbooks approved by the Superintendent of Public Instruction may be used and a satisfactory level of pupil performance in the particular subjects shall have been attained.

The statute neither requires nor contemplates that the services so compensated shall be available to all the children of the State equally. No provision in the statute imposes any obligation upon a school wishing to avail itself of the benefits of the statute to admit children it otherwise would not admit. The act contemplates that the nonpublic

schools will continue to teach the children they have been teaching in the past. Nothing in the statute forbids them from excluding children on the basis of race, religion, poverty, inability to meet prescribed aptitude or achievement standards, maintenance of prescribed behavior standards, or any other ground. The rationale of the act is that if the nonpublic schools closed down and the children were therefore transferred to the public schools the cost of educating them there would be substantially higher than that involved in purchasing from the nonpublic schools the cost of the secular services of their teachers. It should be noted that while the statute requires that the nonpublic schools achieve satisfactory levels of pupil performance, nothing in it precludes a school from expelling (and thus sending to the public schools) children unable to attain those levels.

The plaintiffs in the action are a number of individual residents and taxpayers of the State, one of whom is a Negro parent of a child attending a public school, and several organizations. The organizations—the Pennsylvania State Education Association, the Pennslyvania Conference of the National Association for the Advancement of Colored People, the Pennsylvania Council of Churches, the Pennslyvania Jewish Community Relations Conference, Americans United for Separation of Church and State, and the American Civil Liberties Union—share as a common objective the separation of church and state and the opposition to the use of public funds for the support in whole or in part of sectarian schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion.

The defendants in the suit are the State Superintendent of Public Instruction and the State Treasurer, and seven sectarian educational institutions. After motion to dismiss was filed, limited intervention was granted to the Pennsylvania Association of Independent Schools.

The complaint asserts three causes of action: That the act on its face and as applied violates (1) the Establishment Clause of the First Amendment, (2) the Free Exercise Clause of the First Amendment, and (3) the Equal Protection Clause of the Fourteenth Amendment.

None of the defendants filed answers to the complaint. Instead, they moved to dismiss the complaint. The District Court, with Chief Circuit Judge Hastie dissenting, ruled that (1) the individual plaintiffs have standing to bring the action but the organizational defendants do not; (2) neither has standing to assert the Equal Protection claim; and (3) the complaint fails to state a claim upon which relief can be granted.

The Question to Which This Brief Is Addressed

This brief is addressed to the single question whether the statute, if applied to schools organized, controlled and operated to propagate and promote a particular religion, violates the Establishment Clause of the First Amendment.

Summary of Argument

Viewing the situation as it actually is rather than as labeled by the Pennslyvania legislature, the statute here challenged provides for direct subsidization out of public funds of schools organized, controlled and operated to propagate particular religious faiths. Under the principle whose origin antedates the First Amendment but which was most authoritatively expressed in *Everson* v. *Board of Education,* 330 U. S. 1 (1947), such subsidization is violative of the First Amendment. This principle has never been repudiated by this Court and remains today the law of the land. However, even if the court below was correct in applying only the purpose-effect test expressed in its present form in *Abington School District* v. *Schempp,* 374 U. S. 203 (1963), the statute is likewise unconstitutional, since its purpose and certainly its effect is to advance religion. Finally, applying the test most recently expressed by this Court in *Walz* v. *Tax Commission,* 90 S. Ct. 1409 (1970), the statute provides for such entanglement of the state in religion as the Court in *Walz* held to be forbidden by the First Amendment.

ARGUMENT

1. The Posture of the Controversy

As the court below noted, a notion to dismiss for facial insufficiency according to well-settled law admits the well-pleaded facts in the complaint. Granting of the motion is a determination that no matter what the plaintiffs may prove within the reasonable scope of the factual allegations, they will not be entitled to prevail. Applying that principle to the present case, the court held that although

the complaint alleged that the challenged law has as its purpose and primary effect the advancement of religion, that allegation is not one of fact but a conclusion of law, and hence is not deemed admitted (App. A. 88-89). The court determined (not, of course, found) that the statute did not have as its purpose and primary effect the advancement of religion, and hence was constitutional.

Under the test applied by the court, if *either* the purpose *or* the primary effect of the statute is the advancement of religion, the statute is unconstitutional. The complaint herein alleges that the statute on its face and *as applied* has the effect of advancing religion. By denying the plaintiffs the opportunity of proving how the statute is in fact carried out, the court held that irrespective of what is done under the statute (so long, of course, if it does not violate its express terms), it cannot as a matter of law have the effect of advancing religion.

We believe this to be erroneous. Even if legislative purpose be deemed a matter of law not admitted on a motion to dismiss for insufficiency, the same cannot be true of effect. The effect of the statute is not something that can be judicially decreed. In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), the Court did indeed decide the issues without a trial, but there the complaint challenged the statute only on its face and not as applied, and, in addition, both sides moved for summary judgment without trial thereby conceding that no factual issues needed to be determined.

Assuming that the allegations in the complaint regarding purpose and effect are conclusions of law and hence

not deemed admitted, the same certainly cannot be said of the allegations that the institutional defendants herein and most of the other educational institutions which have applied for payments under the act are sectarian institutions which are (1) controlled by churches or religious organizations, (2) have as their purpose the teaching, propagation and promotion of a particular religious faith, (3) conduct their operations, curriculums and programs to fulfill that purpose, (4) have policies and practices which exclude from admission or otherwise discriminate against persons by reason of race, and (5) which discrimiate by reason of race or religion in the employment of teachers and other persons to administer the educational services specified in the statute (App. A. 12-13).

We find it difficult to believe that no matter what test for constitutionality under the Establishment Clause is applied, a statute which allows public funds to be used to finance even secular instruction in such institutions can be upheld.

2. Purchase or Subsidy?

The dismissal of the complaint without trial deprived the plaintiffs of the opportunity to establish by an examination into the legislative history of the statute that its purpose was to subsidize nonpublic schools. We submit, however, that unless the courts close their eyes to what everyone else can see, they can hardly fail to see that what is called a purchase of services is nothing but a subsidy under a different label.

"Two great drives," Mr. Justice Rutledge said in his dissent in *Everson* (330 U. S. at 63), "are constantly in mo-

tion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools."

The former drive has been blunted to a large extent by this Court's decisions in *McCollum, supra, Engel* v. *Vitale*, 370 U. S. 421 (1962) and *Schempp, supra.* But no one who reads the daily newspapers can be unaware of the ever increasing intensity with which the second drive is being pursued today. Within the last two years at least, seven states have undertaken to give subsidies to parochial and other private schools. (See, dissenting opinion of Mr. Justice Douglas in *Walz*, 90 S. Ct. 1434.[7]) In practically all cases, as in Pennsylvania, a major justification for the enactment of the statute is that unless the private schools receive financial aid from the state, they may be forced to close, thus imposing upon the public schools the added burden of educating the children of the private schools.[8]

In determining the constitutionality of a state statute, the Federal courts are not bound by legislative statements

7. To the five states cited—Pennsylvania, Ohio, New York, Connecticut and Rhode Island—must be added Iowa, Senate File 1293, approved April 29, 1970, and New Hampshire (ch. 51, approved May 4, 1970). Efforts in Maine and Massachusetts to enact similar laws were frustrated at least temporarily by adverse advisory opinions of the highest court in each state. Opinion of the Supreme Judicial Court, —— Me. ——, 261 A. 2d 58 (1970); Opinion of the Supreme Judicial Court, —— Mass. —— (decided May 11, 1970).

8. Such justification for subsidization of parochial schools is hardly new. It has often been asserted and has consistently been judicially rejected. An unconstitutional means of achieving an objective does not become permissible because it is cheaper than constitutional means. See *Opinion of the Supreme Judicial Court of Maine, supra.*

of purpose or by findings in the statute. The First Amendment would be little more than a parchment barrier if judicial scrutiny were foreclosed by the incantation of some ritual such as "secular purpose and effect." As this Court said in *Evans* v. *Abney*, 90 S. Ct. 628, 633 (1970):

> No state law or act can prevail in the face of contrary federal law, and the federal courts must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated.

One of the factors in the search for fact and truth is the historical context of the statute. Mr. Justice Brennan recently pointed this out in his opinion in *Adickes* v. *S. H. Kress & Co.*, 38 U.S.L.W. 4434 at 4447 (June 1, 1970):

> A legislative or constitutional provision need not be considered in isolation, but may be examined "in terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'" Reitman v. Mulkey, 387 U. S. 369, at 373 (1967).

The application of this principle to the Establishment Clause was recently exemplified in *Epperson* v. *Arkansas*, 393 U. S. 97 (1968). There the Court invalidated under the Establishment Clause a state statute forbidding the teaching of evolution in the public schools. The statute itself made no mention of religion or the Bible. Nevertheless, the Court found that the statute came out of the same historical context that spawned the Tennessee "monkey law" which gave rise to the famous Scopes trial and found that the purpose of the law was to protect fundamentalist sectarian doctrine from impairment by public school teaching.

Applying this principle to the present case, the Court may judicially note that various devices have been and are continuing to be contrived to effect subsidization without appearing too flagrantly to be violating the First Amendment and state constitutional prohibitions.[9] The Pennsylvania statute challenged herein is clearly one such device. Labeled a contract for the purchase of services, the transaction between the state and the sectarian school is no such thing. The school receives public funds for continuing to do what it has always been doing and what it has legally been required to do. The same teachers continue to give the same instruction to the same children in the same place and at the same time and under the same ecclesiastical control as theretofore. No child has a legal right to enter the school and demand participation in the instruction paid for by the public.

It is true that under the statute a school desiring to receive its benefits must use state-approved textbooks, achieve a satisfactory level of pupil performance and, five years hence, employ to teach the secular subjects only teachers who are certified by the state. But measured by classic concepts of contract law, this hardly constitutes legal consideration. It is within the constitutional power to impose these and similar requirements upon nonpublic schools. *People* v. *Donner,* 199 Misc. 643, 99 N.Y.S. 2d 830, *aff'd* 278 App. Div. 705, 103 N.Y.S. 2d 757, *aff'd* 302 N.Y. 857, 100 N.E. 2d 48, *appeal dismissed,* 342 U. S. 884 (1951); *Kansas* v. *Garber,* 197 Kan. 567, 419 P. 2d 896,

9. A recent example is a New York statute, enacted April 20, 1970, which appropriates public funds to sectarian schools purportedly to meet their expenses in keeping attendance and other records required by law.

appeal dismissed, 389 U. S. 51 (1967). Many states in fact do so. See, National Education Association, *The State and Sectarian Education* (1946).

The Supreme Judicial Court of Massachusetts found no difficulty in recognizing a statute similar to and patterned after the one here challenged to be nothing but a subsidization law under a different label. In *Opinion of the Supreme Judicial Court,* —— Mass. —— (decided May 11, 1970) it unanimously held that the statute violated Section 2 of Article XLVI of the state constitution which provides that "no grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated."

Recognizing the reality of the situation, the issue to be decided by this Court is whether the First Amendment permits the state to subsidize the operations of an educational institution ecclesiastically controlled, organized and operated for the purpose of propagating and advancing a particular religious faith, and limited in its admission and employment policies to adherents of that faith. We submit that whatever test is used, such subsidization is not permissible else the First Amendment means nothing.

3. The *Everson* Test

In *Everson*, the Court ruled that a state (New Jersey) could constitutionally finance bus transportation of children to parochial as well as public schools. The Court found the program to be a public safety measure to protect all children from traffic hazards and the dangers of the road. The Court said (330 U. S. at 16):

> We must consider the New Jersey statute in accordance with the * * * limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power *even though it approaches the verge of that power.* * * * *New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.* On the other hand, other language of the amendment commands that New Jersey cannot * * * exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. * * * (Emphasis supplied.)

The Court then set forth the following paragraph which has become the most authoritative, frequently reiterated and almost classic exposition of the meaning of the Establishment Clause (*id.* at 15-16):

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions,

> or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis supplied.)

The New Jersey statute was upheld because the "state contributes no money to the schools" and "does not support them" (330 U. S. at 18).

In *McCollum*, the Court held it unconstitutional to allow the use of public school premises for sectarian teachings. The Court repeated that, "*No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.*" (Emphasis supplied.) 333 U. S. at 210.

In *Zorach* v. *Clauson*, 343 U. S. 306 (1952), the Court upheld the constitutionality of a program of released time for religious education under which children would be released from public school for one hour a week to receive religious instruction in church schools, *because no expenditure of public funds or use of public buildings was in-*

volved. The Court said (at 314): "*Government may not finance religious groups* nor undertake religious instructions *nor blend secular and sectarian education.* * * *" (Emphasis supplied.)

In *McGowan* v. *Maryland,* 366 U. S. 420, 443 (1961), and *Torcaso* v. *Watkins,* 367 U. S. 488, 493 (1961), the Court again, in each case, repeated the statement, made in the *Everson* and *McCollum* cases, that "*No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.*" (Emphasis supplied.)

In *Engel* v. *Vitale,* 370 U. S. 421, 431 (1962), the Court, in holding unconstitutional the practice of prayer recitation in the public schools, which had been prevalent almost since the founding of the public schools, stated that when "the power, prestige *and financial support* of government is placed behind a particular religious belief," the Establishment Clause of the First Amendment is violated. (Emphasis supplied.) The Court (at 436) quoted from Madison's *Memorial and Remonstrance* that "* * * the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

This was the state of the law before *Schempp.* In every Establishment case between *Everson* and *Schempp,* except *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94 (1952) (where it was not even remotely relevant), the Court reiterated the *Everson* principle that government may not

finance or subsidize institutions that teach or practice religion. The court below, however, apparently took the position that all this had been implicitly repudiated in *Schempp* and was superseded by a new test announced in that case. In considering the validity of the assumption, we suggest that particularly pertinent is the following statement by the greatest of Chief Justices in his opinion in *United States* v. *Burr*, 4 Cranch 470, 482 (1807):

> [A]n opinion which is to overrule all former precedents and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. * * * General expressions ought not to be considered as overruling settled principles without a direct declaration to that effect * * * (4 Cranch 470, 482 (1807).)

In *Schempp*, the Court declared unconstitutional the practice of devotional Bible reading and prayer recitation in public schools. In its opinion, the Court, in referring to the constitutionality of the permissive statute, said:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect which neither advances nor inhibits religion. (373 U. S. at 222.)

There is, we submit, nothing in *Schempp* or in any subsequent decision of this Court to support the assumption that the *Everson* principle that government may not finance

institutions engaged in the practice or propagation of religion has been repudiated or abandoned. Certainly, nothing in the *Schempp* opinion suggests anything even remotely justifying such an assumption. Indeed, in *Schempp* the Court cited *Everson in support of the Schempp test.* The justification for the assumption lies, if anywhere, not in *Schempp* but in *Allen.* There the Court upheld the constitutionality of a New York statute providing for the loan of secular textbooks to children attending nonpublic schools, including parochial schools. Applying the test set forth in *Schempp,* the Court held that it could not assume that either the purpose or primary effect of the statute was to advance religion.

But *Allen* hardly supports an assumption that the *Everson* test was repudiated. In *Allen,* the Court not only cited *Everson* but quoted the critical phrase from the classic paragraph that the First Amendment bars any "tax in any amount, large or small * * * levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." (392 U. S. at 242.) Quoting a principle with approval, we suggest, is hardly an effective way of repudiating it.

In *Allen,* the Court held, as it had held in *Everson,* that where a state undertakes a secular program for the benefit of children, the program is not constitutionally impermissible merely because as an incidental by-product thereof religious educational institutions might benefit. That is a far cry from saying that government may finance the institution by paying its teachers' salaries. This the Court made clear in the following language:

> • • • The law merely makes available to all children the benefit of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. *Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.* Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution. (392 U. S. at 243-244. Emphasis added.)

As if to underline the critical distinction between aiding children and their parents on one hand and financing the institutions' operations, the Court stated:

> It should be noted that the record contains no evidence that any of the private schools in appellants' districts previously provided textbooks for their children. There is some evidence that at least some of the schools did not; intervenor defendants [parents of children attending parochial schools] asserted that they had previously purchased all their children's textbooks. * * * (*ibid.*).

Thus, *Allen,* unlike the present case, presents no instance of governmental financing relieving the sectarian school of an expenditure which it otherwise would have made.

On the same day that *Allen* was decided, the Court decided *Flast* v. *Cohen,* 392 U. S. 83 (1968), which, we believe, supports our conclusion. The gravamen of the complaint in that case was that Federal funds appropriated under the Elementary and Secondary Education Act of 1965 were being used as in the present case, to finance instruction in reading, arithmetic and other secular subjects

in religious schools and to purchase textbooks and other instructional materials for use in such schools, all in violation of the Establishment Clause of the First Amendment. The Government moved to dismiss the suit on the ground that the plaintiffs, as mere taxpayers, had no standing to challenge judicially an expenditure of Federal funds.

While the Court specifically stated that it was not passing on the merits of the particular case since there was nothing before it but the complaint, it upheld the plaintiffs' standing to sue. It did so on the ground that the complaint did allege a facially sufficient claim under the First Amendment's Establishment Clause. Such a holding could not have been made if governmental financing of the so-called secular aspects of sectarian schooling did not raise a constitutional issue under the First Amendment. Were such financing not inconsistent with the Establishment Clause, the plaintiffs' challenge would simply be to an expenditure for the general welfare, a challenge which the Court held could not, under *Frothingham* v. *Mellon,* 262 U. S. 447 (1923), be made by a taxpayer.

That the Court deemed subsidization of institutions that teach or propagate religion violative of the Establishment Clause is clear from the following (392 U. S. at 103-104):

> Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general. James Madison, who is generally recognized as the leading architect of the religion clauses of the First

Amendment, observed in his famous Memorial and Remonstrance Against Religious Assessments that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." 2 Writings of James Madison 183, 186 (Hunt ed. 1901). The concern of Madison and his supporters was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, §8.

Nothing in *Walz*, the latest Establishment case, indicates an intent to repudiate or abandon the *Everson* principle barring the subsidization of institutions that teach or practice religion. True enough, the Court commented on the "hazards of placing too much weight on a few words or phrases" and illustrated this hazard by reference to the words in the paragraph in *Everson* quoted above which state that government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another." (90 S. Ct. at 1412.) But the Court in upholding the tax exemptability of religious institutions made it quite clear that it was not sanctioning governmental subsidization of such institutions. The whole tenor of the decision reflects a constitutional distinction between subsidy and exemption and an avoidance of anything that might be construed to impair the vitality of the basic *Everson* principle. Thus, the Court emphasized that

> The grant of tax exemption is not sponsorship since *the government does not transfer part of its revenue to churches* but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries or hospitals into arms of the state or *employees "on the public payroll."* There is no genuine nexus between tax exemption and the establishment of religion. (90 S. Ct. at 1415. Emphasis added.)

In the present case, of course, the state government does transfer part of its revenue to churches and does in fact place the employees of the church schools "on the public payroll," for that indeed is the sole purpose of the statute here challenged.

Again, the Court said (at 1414):

> Granting tax exemptions to churches necessarily operates to afford an *indirect* economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. *In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case.* The hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church or government led to

the kind of involvement we seek to avoid. (Emphasis added.)

In *Everson* the Court articulated a principle going back to the time of the birth of the Republic, namely that government may not subsidize institutions that propagate or practice religion. Nothing the Court has done or said since then manifests any intent to retreat from that principle. Applying that principle to the present case requires a determination that the judgment of the court below was clearly erroneous.

4. The *Schempp* Test

If the majority of the court below was correct in its assumption that the *Everson* test has been superseded by *Schempp,* then it would seem even more clear that the *Schempp* test has been superseded by *Walz.* After all, the *Schempp* Court expressly relied on *Everson* for its test whereas the *Walz* Court did not cite *Schempp* even in a footnote. On the contrary, the Court in *Walz* studiously avoided application of the *Schempp* test. While it noted that the "legislative purpose of a property tax exemption is neither the advancement nor inhibition of religion" (90 S. Ct. at 1413), the second half of the test it applied was stated not in terms of advancement or inhibition (as in *Schempp*) but of "entanglement" (*id.* at p. 1414).

We do not urge that *Walz* has superseded *Schempp* for the same reason that we believe *Schempp* did not supersede *Everson.* All three tests express in differing phraseology a principle which has been part of American history from its beginning as a nation, the principle that tax-raised

funds may not be used to support institutions that practice or propagate religion.

Assuming, however, that we are incorrect on both scores, and that *Schempp* promulgated a new and different test which was not superseded by *Walz*, we submit, nevertheless, that the majority of the court below was in error in dismissing the complaint and that at the very least the plaintiffs should have been allowed to establish by a trial of the facts that the purpose or the primary effect of the statute was to advance religion.

The majority of the court below refused to explore into the actual purpose of the statute. While it said that the "legislative findings of the State are not to be lightly set aside" (A92), it actually held that they may not even be inquired into. We have indicated above why we believe this to be erroneous. Here we add only that if this were to be a universal rule, *Brown* v. *Board of Education*, 347 U. S. 483 (1954) would be a dead letter. See *Adickes* v. *S. H. Kress & Co.*, *supra* (separate opinion of Mr. Justice Brennan). It is no answer that *Brown* dealt with racial segregation whereas the present case does not (or at least no longer does so in view of the lower court's holding that none of the plaintiffs have standing to raise the issue, A87). The First and Fourteenth Amendments are part of the same Constitution; the prohibition against governmental subsidization of religion is no less constitutionally mandated than that against racial segregation. Nor does the Constitution authorize different standards of judicial scrutiny into legislative purpose for different regions of the country; the Pennsylvania legislature is neither more nor

less immune from judicial scrutiny than that of Mississippi. In any event, in *McGowan* and in *Epperson* this Court held applicable to Establishment cases the principle of judicial scrutiny into legislative purpose rejected by the court below. In the former the court expressly stated (366 U. S. at 453):

> • • • We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, *in conjunction with its legislative history,* or in its operative effect—is to use the State's coercive power to aid religion. (Emphasis added.)

Whatever justification the court below may have had for foreclosing inquiry into the purpose of the statute we can see none for its refusal to allow the plaintiffs to establish that its effect is to advance religion. The *Schempp* test speaks in alternatives; if either the purpose or the primary effect is to advance religion, the statute is unconstitutional. A legislature can perhaps decree purpose; but even Parliament cannot decree effect.

We submit that the Pennsylvania statute if not on its face at least as applied must have the effect of advancing religion. As we have indicated, it is our contention that the *Everson* and *Schempp* tests are not inconsistent but in fact say the same thing in different ways. That which aids religion advances it and the effect of aid to religion is obviously to advance it. This conclusion is not negated by the fact that the *Schempp* decision, in stating the test, uses the word "primary". Indeed, the source from which the *Schempp* Court took the purpose and effect test, *McGowan*

v. *Maryland,* did not use the word "primary." There the Court said:

> After engaging in the close scrutiny demanded of us when First Amendment liberties are at issue, we accept the State Supreme Court's determination that the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation. (366 U. S. at 449.)

What the word primary means is that the aid to religion is a direct consequence rather than an incidental by-product of the governmental action. It means that governmental pursuit of a secular goal is not constitutionally impermissible because as an indirect consequence thereof religion may be advanced, just as it would not be impermissible merely because as an indirect consequence religion may be inhibited. In the complex world we live in and the vast range of governmental activities, very few if any private institutions, religious as well as secular, are not in some way affected by governmental action, either to their advantage or disadvantage.

This, as the Court noted in *Walz,* is what the *Everson* decision means. It is also what *McGowan,* which together with *Everson* was the source of the *Schempp* test, means. In *McGowan* the Court upheld constitutionality of Sunday closing laws on the ground that notwithstanding their religious origin, their purpose and effect today was not to aid religion but to provide a common day of rest, relaxation and family togetherness. Obviously, as the Court pointed out, if persons may not open their stores on Sunday some of them at least may go to church and to that extent religion is aided. But equally obviously such aid was no

more than an incidental by-product or indirect consequence of the governmental action.

This Court noted in *Walz* that no religious body that maintains schools would deny that an affirmative if not dominant policy of church schools is to assure future adherents to a particular faith by having control of their total education at an early age (90 S. Ct. at 1412-1413). We cannot see how subsidization of such schools, even if the funds are earmarked for secular subjects, can be held not to have a primary or dominant effect of advancing the particular religion which maintains the schools. This was recognized by Judge Hastie, who in his dissent in the court below, said (A103-104):

> It is unrealistic to view the present statute as merely subsidizing secular instruction and thus only incidentally benefiting religious institutions by releasing their funds for religious purposes. The primary purpose for which sectarian schools formulate and offer a comprehensive curriculum apart from the public school system is religious. Through a total educational program offered in a separate religious environment, sectarian schools serve to inculcate and reinforce in children doctrine and moral precepts derived from the tenets of the church. It is not necessary to inquire whether, for the fulfillment of this primary religious purpose every course is taught with religious overtones. The crucial consideration is that the total teaching program is offered in a separate religious environment and for the better achievement of appropriate religious objectives. When the state reimburses a sectarian school for any part of the curricular costs of such a teaching program it directly finances and supports a religious enterprise. Constitutionally, such subsidizing of a religious enterprise is not essentially

different from a payment of public funds into the treasury of a church. Such a prohibited involvement of the state in a religious undertaking is not validated merely because the religious enterprise itself incidentally relieves the state of the cost of educating many children.

The same basic point was made by the Supreme Court of Maine in invalidating a similar statute, as follows:

> Fundamentally it cannot be gainsaid that the sectarian school exists for the purpose of adding an additional dimension, to wit, advancement of the faith, to the secular education which it supplies. If the parents sought only the secular education, such is available to them as a matter of right in the public school system. Sectarian school education is selected for its religious atmosphere and teaching.
>
> Budgets for the secular instruction may be technically separable from the budget of the entire operation of the school, but the institution is an inseparable whole, which is strengthened in its institutional purpose when it is strengthened in any of its departments by outside financial assistance. See *Schempp,* supra, p. 1575. Economics is not the controlling factor in determining the validity or invalidity of L. D. 1751. The Constitution is the controlling factor. The school administrative units accomplish nothing under this Act that they could not reasonably accomplish within the public school systems and without benefit to sectarian schools.
>
> Applying the *Schempp* test, the purpose and primary effect of L. D. 1751 is to subsidize those sectarian schools, the closing of which would cast an increased student burden on the public school system as measured under Section 3804. Such subsidization by its assuring the continuance of the school, assures the continuance of the purpose for which the school exists, —advancement of the faith it represents. The net result of all of this is for the State to invade the sectarian

school system in a manner which violates the independence to which it is constitutionally entitled. The result is not the neutrality required by the Constitution.

The most recent judicial consideration of the constitutionality of a statute such as the one challenged herein is the case of *DiCenso* v. *Robinson,* decided by the United States District Court for Rhode Island on June 15, 1970. The court unanimously held the statute unconstitutional, the majority (Circuit Judge Coffin and District Court Judge Bownes) on the ground that it violated both the *Schempp* and the *Walz* tests, the minority (District Court Judge Pettine) on the ground that it violated the *Walz* test. Judge Coffin's opinion is a carefully considered analysis which we commend in its entirety to this Court's attention. In his opinion Judge Coffin said:

> The second part of the *Schempp* test—determining the statute's "primary effect"—presents a more difficult problem of both definition and application. Plaintiffs have argued that "primary" means "essential" or "fundamental". Defendants and intervenors have taken a more literal position, claiming that "primary" means "first in order of importance". The problem of definition is critical in this case because, as we have noted in our findings, the Act has two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "the primary effect", as *Schempp* seems to require, are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.
>
> Intervenors, in an effort to give shape to the *Schempp* test, have urged us to focus solely on the activity subsidized in judging effect. In other words, intervenors propose that we examine only the activ-

> ities of the teachers receiving aid and ignore the religious nature of the schools in which they teach. Such a narrow perspective, however, strikes us as unrealistic when examining direct financial aid to denominational schools. The expenses of a religious institution may be apportioned in a variety of ways among its "secular" and "religious" activities. Under plaintiffs' [intervenors' (?)] proposed test, sophisticated bookkeeping could pave the way for almost total subsidy of a religious institution by assigning the bulk of the institution's expenses to "secular" activities. * * *

In a footnote Judge Coffin added:

> Our brother in dissent accepts intervenors' narrow view of the *Allen* test. However, in *Allen* there was no record on which to predicate a finding that the effect of the statute would differ from its declared purpose. Moreover, as our findings indicate, the "religious enterprise" assisted in this case is not the discrete teaching of religion, but the maintenance of an educational environment within which religious instruction takes place in varied ways. *McCollum* v. *Board of Education*, 333 U. S. 203 (1948), suggests to us that such an environment may not be maintained at public expense. * * *

We submit, therefore, that under the *Schempp* test, no less than under *Everson*, the decision of the majority below was erroneous.

5. The *Walz* Test

In his dissenting opinion in the court below, Judge Hastie stated:

> Mr. Justice Goldberg, in *Abington* v. *Schempp*, 374 U. S. 203, 248 and Mr. Justice Harlan, in *Board of Education* v. *Allen*, 392 U. S. 236, 249, have both ex-

pressed what I believe to be a sound rationalization that the First Amendment is violated by state action which will "involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religious clauses of the First Amendment preclude." I am unable to avoid the conclusion that the state undertaking authorized by Act No. 109 would thus intolerably involve the state in the realm of the sectarian.

In this respect Judge Hastie anticipated this Court's decision in *Walz*. If the purpose of a law, the Court held in *Walz*, is to advance or support religion it is unconstitutional. But even if that is not its purpose. the law is still unconstitutional if its end result or effect is "an excessive government entanglement with religion." (90 S. Ct. at 1414). Tax exemption for churches was upheld because it involved less entanglement than would the removal of exemption. But exemption, the Court held, was constitutionally different from subsidy because the latter does involve entanglement. The Court said (at 1414):

> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them. In analyzing either alternative the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement. Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case. The

> hazards of churches supporting government are hardly less in their potential than the hazards of governments supporting churches; each relationship carries some involvement rather than the desired insulation and separation. We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid.

The statute here challenged does "encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards." The Act (section 5) imposes upon the State Superintendent of Public Instruction the responsibility for administering the statutory program. It defines "secular subject" whose teaching is subsidized to exclude "any subject matter expressing religious teaching, or morals or forms of worship of any sect." (Section 3).

This provision is of course necessary, for the teaching of secular subjects permeated with religion could not constitutionally be subsidized by the state as *McCollum* and *Allen* make clear. But in seeking to avoid the Scylla of sectarianism the statutory plan is necessarily engulfed in the Charybdis of entanglement. There is simply no way of avoiding the former danger but by "sustained and detailed administrative relationships" or, to put it in other words, by continued surveillance and policing.

It is no answer that the same "sustained and administrative relationships" are required in respect to public schools and that they too must be policed lest evangelistic teachers bootleg sectarianism into biology or history. The critical difference lies in the fact that the First Amendment does not forbid "sustained and detailed administrative re-

lationships'' between a secular government and a secular school system, but it does forbid them between a secular government and a religious school system.

Both the majority and the minority in *DiCenso* v. *Robinson* agreed that a statute such as the one challenged herein cannot avoid unconstitutionality under the no-entanglement test of *Walz*. Because the court's opinion in that case is so cogent, we take the liberty of setting forth here the following rather lengthy extract:

> When the effect of the Salary Supplement Act is judged by this standard, two significant dangers appear. First, the Act authorizes a subsidy which, unlike the exemptions involved in *Walz*, must be annually renewed. In a nation of many sects, the efforts to obtain government financing of those few denominations which support school systems will inevitably excite bitter controversy. In some jurisdictions where the majority belong to a single denomination, state subsidies of sectarian schools may amount to an establishment in the classic sense. In Rhode Island itself, sectarian controversy is likely to be exacerbated by the continuing financial crisis in its parochial schools, and by the open-ended nature of the Act. If this grant is constitutional, we would find it difficult to distinguish a 50 or 100 per cent subsidy of teachers' salaries, or a percentage subsidy of the total cost of ''secular'' education such as Rhode Island already provides its public schools.
>
> On the other side of the coin, significant state subsidies will inevitably produce significant state limitations on the freedom of denominational schools. A direct subsidy of the educational process such as this statute provides requires greater administrative involvement between church and state than the payment of transportation costs involved in *Everson* or the

loaning of textbooks in *Allen*. In *Everson*, the local school committee simply reimbursed the parents of parochial school children for bus fares. In *Allen* public school officials—in theory, at least—performed their customary task of determining which books were suitable for public school use. *Compare* R. I. Gen. Laws §16-1-9 (Supp. 1967). Under this statute, by contrast, the Commissioner of Education must monitor parochial school expenditures and in close cases determine which spending is "religious" and which "secular". This on-going administrative relationship between government and the Catholic schools creates the possibility of legal disputes over the "secular-religious" distinction, *cf. Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hill Memorial Presbyterian Church*, 393 U. S. 440 (1969), and may well influence the allocation of church resources as the parishes tailor their spending to meet the Commissioner's criteria.

Equally important, the kind of involvement which this statute promotes may significantly limit the internal freedom of parochial schools. Already the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class lest he endanger his subsidy. Similar restrictions may be expected on the content of courses. In this very case we have been forced to inquire into the teaching in Rhode Island's Catholic schools in order to determine whether religion "permeates" the teaching of secular subjects. *See also Board of Education* v. *Allen*, 392 U. S. at 248. Surely such inquiries represent a substantial limitation on the freedom of parochial schools to set their own curriculum. Moreover, as Judge Hastie pointed out dissenting in *Lemon* v. *Kurtzman*, 310 F. Supp. at 52, private conduct which is heavily subsidized by the

state may be viewed as state action and subjected to the same standards of impartiality which we demand of the government. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961); *cf. Evans* v. *Newton*, 382 U. S. 296 (1966).

Applying these standards to parochial schools might well restrict their ability to discriminate in admissions policies, *cf. Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230 (1957), and in the hiring and firing of teachers, *cf. Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969). At some point the school becomes "public" for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause.

In short, we see as the necessary effects of the kind of legislation involved here not only substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid. We therefore hold that the Salary Supplement Act results in excessive government entanglement with religion and thus violates the Establishment Clause of the First Amendment. *Accord, Opinion of the Justices*, 261 A.2d 58 (Me. Jan. 15, 1970).

Although entanglement is the major test of *Walz* and its application requires reversal of the decision of the court below, there is another, perhaps subsidiary test in *Walz* which leads to the same conclusion, namely the test of practical construction.

In *Walz* both the Court's opinion by the Chief Justice (90 S. Ct. at 1415) and the concurring opinion of Mr. Justice Brennan (at 1418) stressed that tax exemption for churches went back to the earliest days of the Republic; both quoted the comment of Mr. Justice Holmes in *New*

York Trust Co. v. *Eisner*, 256 U. S. 345, 349 (1921) that "a page of history is worth a volume of logic." Both stressed the fact that tax exemption for churches is a universal practice in effect in every one of the states. The antiquity and ubiquity of tax exemption is strong if not conclusive evidence of its constitutionality.

In the present case, however, history and practice point in exactly the opposite direction. From the disestablishment of churches at the end of the 18th and the beginning of the 19th centuries until the enactment of the statute challenged herein neither the Federal government nor any state has directly subsidized the operations of parochial schools. Just as the constitution or laws of every state in the Union authorize tax exemption so do they universally forbid direct subsidization. See Note, *Catholic Schools and Public Money*, 50 Yale L.J. 917 (1941); *Horace Mann League* v. *Board of Public Works*, 242 Md. 645 (1966).

We know of no case in court in the United States, Federal or state, in which a law providing for payment of tax-raised funds to a church to subsidize its parochial school operations has been upheld as constitutional. There have been a number of cases wherein parochial schools, experiencing the financial difficulties faced by the parochial schools in the present case, were purportedly transferred to the public school system under a plan whereby the parochial school premises were rented to the public school authorities and the teachers, usually nuns and sisters, were employed *en masse* by them as public school teachers. With but one exception,[10] the arrangement was held unconstitu-

10. *State ex rel. Johnson* v. *Boyd*, 217 Ind. 348 (1940).

tional in every case,[11] and even in the exceptional case constitutionality was based on a factual finding that the school was no longer a parochial school but had in fact become incorporated into the public school system even though the nuns turned over their public school salary checks to the religious order to which they belonged.

The plan envisaged in the present statute is merely a variation of these efforts and, we submit, equally unconstitutional.

Conclusion

Whether measured by the *Everson* test, the *Schempp* test or the *Walz* test the statute challenged herein cannot be upheld as constitutional in all cases and in all circumstances. We believe it is unconstitutional on its face, but at the very least it is unconstitutional if applied to authorize payment to sectarian institutions which are controlled by churches or religious organizations, have as their purpose the teaching, propagation and promotion of a particular religious faith, and conduct their operations to fulfill that purpose. Accordingly the decision of the court below is erroneous and should be reversed.

Respectfully submitted,

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11. The cases are cited and discussed in Note, *Catholic Schools and Public Money*, 50 Yale L.J. 917 (1941); L. Pfeffer, *Church, State and Freedom* 537-554 (Rev. ed., 1967).